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DOES ARKANSAS (OR ANYONE ELSE) HAVE A VALID MIXTURE OR DERIVED-FROM RULE?

Allan Gates*

I. INTRODUCTION

The recent decisions in *Shell Oil Co. v. EPA*¹ and *United States v. Goodner Bros. Aircraft*² brought a longstanding debate over two important hazardous waste regulations, the so-called "mixture" and "derived-from" rules, into sharp focus. As described in the casenote, *Environmental Law—Retroactive Vacature of the Mixture and Derived-From Rules Under RCRA*, following in this issue, *Shell Oil* invalidated the federal mixture and derived-from rules, and *Goodner Bros.* held that the *Shell Oil* decision applied retroactively. Since most states, including Arkansas, have incorporated the federal mixture and derived-from rules into their state hazardous waste regulations, *Shell Oil* and *Goodner Bros.* raised serious questions about the validity of state as well as federal laws. On one hand, it has been suggested that the invalidation of the federal rules in *Shell Oil* had limited impact because the validity of state mixture and derived-from rules was not addressed in the *Shell Oil* decision, and, therefore, the state mixture and derived-from rules remain in full force and effect. On the other hand, it has been argued that most state mixture and derived-from rules are invalid for the same reasons advanced in the *Shell Oil* case. This article reviews the background of the controversy over the mixture and derived-from rules, examines the validity of the Arkansas rules in the wake of *Shell Oil*, and describes the ongoing regulatory efforts which may finally resolve the debate.

II. HISTORICAL BACKGROUND

A. Promulgation of the Original Hazardous Waste Regulations

The current scheme of regulating hazardous waste in the United States traces its origins to the federal Resource Conservation &

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1. 950 F.2d 741 (D.C. Cir. 1991).

2. 966 F.2d 380 (8th Cir. 1992).

Recovery Act of 1976,³ commonly known as "RCRA." Section 1004(5) of RCRA defines the term "hazardous waste" to mean:

[A] solid waste, or combination of solid wastes, which because of its [sic] quantity, concentration, or physical, chemical, or infectious characteristics may—

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.⁴

This statutory definition of hazardous waste is not self-executing. Instead, RCRA directs EPA to promulgate regulations "identifying the characteristics of hazardous waste, and listing particular hazardous wastes . . . which should be subject to [regulation under the statute]."⁵

Pursuant to the statutory mandate, EPA proposed regulations in 1978 regarding the identification and listing of hazardous wastes.⁶ The proposed regulations defined the term hazardous waste by incorporating the statutory definition quoted above. The proposed regulations then specified criteria for identifying hazardous waste characteristics and for listing hazardous wastes.⁷ The proposed regulations included specific characteristics and listings of hazardous wastes,⁸ and they also specified a procedure by which a waste could be tested for the purpose of demonstrating that it should not be considered a hazardous waste.⁹

EPA conducted several public hearings and received an enormous volume of public comments regarding its 1978 proposed regulations. In May 1980, after litigation challenging the agency's failure to promulgate regulations within the eighteen month statutory timetable, EPA issued the base RCRA regulations.¹⁰ The 1980 regulations abandoned the simple codification of the statutory definition of

3. Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-92 (1988). [hereinafter RCRA].

4. 42 U.S.C. § 6903(5) (1988).

5. Section 3001(b)(1) of RCRA, 42 U.S.C. § 6921(b)(1) (1988).

6. 43 Fed. Reg. 58,946 (1978) (to be codified at 40 C.F.R. pt. 261) (proposed Dec. 18, 1978).

7. *Id.* at 58,955.

8. *Id.* at 58,953-59.

9. *Id.* at 58,959-60.

10. 45 Fed. Reg. 33,066 (1980) (to be codified at 40 C.F.R. pt. 261). For a discussion of the litigation challenging EPA's failure to promulgate regulations within the statutory timetable, see *Illinois v. Costle*, 12 Env't. Rep. Cas. (BNA) 1597 (D.D.C. 1979).

hazardous waste contained in the 1978 proposal and replaced it with a new and highly detailed definition.¹¹ The new definition included the provisions which have come to be known as the mixture and derived-from rules. The 1980 rules also revised the procedures proposed in 1978 for excluding a waste from regulation with a process that requires EPA approval of a formal "delisting" petition under notice and comment rulemaking.¹²

B. The Mixture and Derived-from Rules

As adopted in the 1980 RCRA regulations, the mixture rule provided that "[a] solid waste . . . is a hazardous waste if . . . [i]t is a mixture of solid waste and one or more [listed] hazardous wastes . . . and has not been excluded [through EPA approval of a delisting petition]."¹³ The 1980 regulations go on to provide that such a mixture must be managed as a hazardous waste, regardless of whether it poses any actual hazard, until a delisting petition is presented to and approved by EPA.

The derived-from rule provided that "any solid waste generated from the treatment, storage, or disposal of a hazardous waste, including any sludge, spill, residue, ash, emission control dust, or leachate (but not including precipitation run-off) is a hazardous waste."¹⁴ If the residue is derived from the treatment, storage, or disposal of a characteristic hazardous waste, it ceases to be regulated under subtitle C when it ceases to exhibit any characteristic of hazardous waste.¹⁵ If the residue is derived from the treatment, storage, or disposal of a listed hazardous waste, the residue remains subject to regulation as a hazardous waste until and unless a formal delisting petition is presented to and approved by EPA.¹⁶

The mixture and derived-from rules have subjected significant volumes of treatment residues and solid waste mixtures to stringent hazardous waste regulatory requirements even though the residues and mixtures pose no actual hazard to human health or the environment. Although such residues and mixtures theoretically can be removed from RCRA regulation by means of a delisting petition,

11. Compare 40 C.F.R. § 261.3 (1992), with 43 Fed. Reg. 58,955 (1978) (to be codified at 40 C.F.R. § 250.11) (proposed Dec. 18, 1978).

12. Compare 40 C.F.R. §§ 260.20 and 260.22 (1992), with 43 Fed. Reg. 58,959-60 (1978) (to be codified at 40 C.F.R. § 250.15) (proposed Dec. 18, 1978).

13. 40 C.F.R. § 261.3(a)(2)(iv) (1992).

14. 40 C.F.R. § 261.3(c)(2)(i) (1992).

15. 40 C.F.R. § 261.3(d)(1) (1992).

16. 40 C.F.R. § 261.3(d)(2) (1992).

many of these delisting processes have proven so cumbersome and time-consuming that frequently fail to provide a practical means of relief.

C. The Impact of HSWA

Four years after the promulgation of the base RCRA regulations, Congress passed the Hazardous and Solid Waste Amendments of 1984.¹⁷ Two features of HSWA significantly increased the impact of the mixture and derived-from rules. First, HSWA required owners and operators of hazardous waste management facilities to undertake corrective action with respect to releases of hazardous constituents from any present or former solid waste management units at their facilities.¹⁸ Implementation of the corrective action measures required by HSWA has resulted in the generation of large quantities of environmental media, primarily soil and groundwater, that are contaminated with relatively small quantities of hazardous constituents. EPA takes the position that any contaminated environmental media containing listed hazardous wastes which are generated by corrective action measures must be managed in the same manner as hazardous waste.¹⁹

Second, HSWA mandated the elimination of "land disposal" for many types of hazardous wastes unless the wastes have first undergone substantial pretreatment.²⁰ HSWA required EPA to promulgate treatment standards that must be met as a precondition to any form of land disposal for such wastes. The treatment standards adopted by EPA generally require reduction of the hazardous constituents to extremely low levels, frequently below other accepted thresholds of hazard.

The combination of the corrective action requirements and the land disposal restrictions with the mixture and derived-from rules led to the generation of large volumes of contaminated media that cannot be placed back on or in the ground without first undergoing

17. Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (1984) [hereinafter HSWA].

18. Section 3004(u) of RCRA, 42 U.S.C. § 6924(u) (1988). See *United Technologies Corp. v. EPA*, 821 F.2d 714, 721-23 (D.C. Cir. 1987).

19. 53 Fed. Reg. 17,578, 17,586 (1988) (to be codified at 40 C.F.R. pts. 264-66, 268) (proposed May 17, 1988). This so-called "contained-in" principle was challenged on the ground that it exceeded EPA's authority under RCRA and HSWA, but was upheld as a reasonable interpretation of the mixture and derived-from rules. *Chemical Waste Management, Inc. v. EPA*, 869 F.2d 1526 (D.C. Cir. 1989). In upholding the "contained-in" principle, however, the court of appeals expressly reserved judgment on the validity of the mixture and derived-from rules. *Id.* at 1530 n.4, 1539 n.17.

20. Sections 3004(d)-(g), (m) of RCRA, 42 U.S.C. §§ 6924(d)-(g), (m) (1988).

extensive treatment. As a consequence, the cost of many corrective actions has increased steeply, and many otherwise desirable remedial measures have been rendered impracticable.

D. Ameliorative Proposals

When EPA promulgated the base RCRA regulations, it recognized that the mixture and derived-from rules would subject some waste mixtures to extensive regulation solely because the mixtures contained very small quantities of listed hazardous waste.²¹ Acknowledging the inequity of such situations, EPA contended that the mixture and derived-from rules were still necessary to prevent hazardous waste generators from escaping regulation by diluting or partially treating their hazardous waste.²²

EPA has continued to recognize that strict application of the mixture and derived-from rules can cause inequitable results. Shortly after adopting the base RCRA regulations, EPA amended the mixture rule to exempt certain wastewaters containing small quantities of particular hazardous wastes.²³ EPA stated that this amendment was justified because "the risk to human health and the environment from the management of these waste mixtures is not substantial, so that automatically defining these waste mixtures as hazardous is inappropriate."²⁴ EPA's exemption of the wastewaters in question from the definition of hazardous waste also meant that the sludges derived from the treatment of such wastewaters were also removed from the hazardous waste regulatory system.

On other occasions EPA announced that it was considering other measures which would ameliorate the effect of the mixture and derived-from rules, such as adopting risk-based methodologies to characterize waste as hazardous,²⁵ relisting hazardous wastes based on concentration thresholds,²⁶ or establishing *de minimis* concentration thresholds.²⁷

III. THE *SHELL OIL* DECISION AND ITS AFTERMATH

A. The *Shell Oil* Decision

Immediately after EPA published its base 1980 RCRA regulations, dozens of industry and public interest groups filed petitions for

21. 45 Fed. Reg. 33,095 (1980) (to be codified at 40 C.F.R. pt. 261).

22. *Id.*

23. 46 Fed. Reg. 56,582 (1981) (to be codified at 40 C.F.R. § 261.3(a)(2)(iv)(A)-(E)).

24. *Id.*

25. 51 Fed. Reg. 40,572, 40,578 (1986) (to be codified at 40 C.F.R. pts. 260-62, 264-65, 268, 270, 271).

26. Regulatory Agenda, 52 Fed. Reg. 40,844, 40,884 (1987).

27. Regulatory Agenda, 54 Fed. Reg. 17,258, 17,294 (1989).

review challenging the validity of the regulations. These challenges were ultimately consolidated under the style *Shell Oil Co. v. EPA*. Most of the challenges were stayed by the court to allow the parties an opportunity to engage in settlement negotiations. Some issues raised by the petitions for review were resolved by negotiations. Still other challenges were rendered moot by amendments to RCRA or revisions to EPA's regulations. In 1989, EPA informed the court that it believed the remaining challenges, including the challenges to the mixture and derived-from rules, should proceed to final decision by the court.

The petitioners challenging the mixture and derived-from rules advanced two basic arguments. First, the petitioners argued that the mixture and derived-from rules exceeded EPA's statutory authority because the rules declared waste mixtures and residues to be hazardous within the meaning of RCRA, despite the fact that such wastes might not pose any of the risks contemplated by the statutory definition of the term hazardous waste. Second, the petitioners argued that EPA failed to provide adequate notice and opportunity to comment because none of the agency proposals included a mixture or derived-from rule of the sort contained in the regulation the agency finally adopted.

EPA responded to the petitioners' substantive argument by contending that the mixture and derived-from rules were reasonable presumptions required by the agency's inability to identify simple tests for quantifying the hazards of waste due to characteristics other than ignitability, corrosivity, reactivity, and extraction procedure toxicity. EPA responded to the petitioners' procedural argument by stating that the mixture and derived-from rules were logical outgrowths of the original proposals it had published in 1978 for public comment.

On December 6, 1991, the District of Columbia Circuit Court of Appeals held EPA's mixture and derived-from rules invalid because EPA had not provided adequate notice or opportunity for public comment.²⁸ The court of appeals reviewed the history of the rulemaking proceeding and concluded that the mixture and derived-from rules were a substantial departure from the proposals originally published by EPA which the public could not reasonably have anticipated. Since the court held the regulations invalid on procedural grounds, it refrained from considering the argument that the regulations exceeded EPA's statutory authority.²⁹

28. *Shell Oil Co. v. EPA*, 950 F.2d 741 (D.C. Cir. 1991).

29. The court stated that: "As we vacate them on procedural grounds, we do not reach petitioners' argument that the mixture and derived-from rules unlawfully expand EPA's jurisdiction under Subtitle C of RCRA." *Id.* at 752.

Apparently in response to EPA's concerns that invalidation of the mixture and derived-from rules could open significant loopholes in the ongoing regulation of hazardous waste, the court of appeals suggested that EPA could readopt the mixture and derived-from rules on a temporary basis under the "good cause" exemption in the Administrative Procedure Act:

Because the EPA has not provided adequate notice and opportunity for comment, we conclude that the mixture and derived-from rules must be set aside and remanded to the EPA. In light of the dangers that may be posed by a discontinuity in the regulations of hazardous waste, however, the agency may wish to consider reenacting the rules, in whole or part, on an interim basis under the "good cause" exemption of 5 U.S.C. § 553(b)(3)(B) pending full notice and opportunity to comment.³⁰

B. The Interim Regulations

The District of Columbia Circuit Court of Appeals' decision invalidating the mixture and derived-from rules precipitated an intense debate between EPA and the Office of Management and Budget (OMB). OMB argued that EPA should not readopt the mixture and derived-from rules, even on an interim basis as suggested by the court of appeals. Instead, OMB argued that EPA should adopt entirely new regulations based on the concentrations of listed wastes which might be found in mixtures or derived from residues. EPA, on the other hand, argued for immediate readoption of the mixture and derived-from rules on an interim basis pending further study of the subject.

Ultimately a compromise was reached. On February 18, 1992, only hours before the court of appeals mandate was scheduled to issue, EPA readopted the mixture and derived-from rules on an interim basis, but the new regulations contained a novel one-year sunset provision.³¹ Under this sunset provision, the interim regulation specifically stated that it would expire on April 28, 1993.³² In the meantime, EPA stated that it would undertake rulemaking proceedings to adopt new regulations which would replace the interim rules at their expiration.

30. *Id.*

31. 57 Fed. Reg. 7628 (1992) (to be codified at 40 C.F.R. pt. 261).

32. *Id.* at 7633.

IV. RETROACTIVITY OF THE *SHELL OIL* DECISION

One of the immediate concerns of EPA after the decision in *Shell Oil* was whether the decision would be applied retroactively in pending enforcement actions. Partially as a result of these concerns, EPA filed a petition for rehearing and request for clarification that the circuit court of appeals' judgment should not be given retroactive effect. EPA argued that retroactive application of the judgment invalidating the mixture and derived-from rules would have serious adverse effects on numerous pending enforcement proceedings. The court of appeals denied the agency's petition for rehearing and denied the motion for clarification without comment.

When EPA readopted the mixture and derived-from rules under the "good cause" exemption, the public notice included a statement that the agency believed the *Shell Oil* decision should not be applied retroactively.³³ This statement was substantially identical to the argument EPA had made to the court of appeals in the agency's unsuccessful request for clarification of the judgment.

Although EPA's readoption of the mixture and derived-from rules appeared to reinstate the rules as procedurally valid regulations on a prospective basis, petitions for review have been filed reasserting the argument that the interim rules exceed EPA's statutory authority.³⁴

The potential retroactive effect of the *Shell Oil* decision on EPA's mixture and derived-from rules raised a closely related question under state hazardous waste laws. Virtually every state has adopted hazardous waste regulations which either incorporate the federal mixture and derived-from rules by reference or repeat them verbatim in the state regulations.³⁵ EPA and most states have taken the position that state mixture and derived-from rules continue in full force and effect even though *Shell Oil* invalidated the federal regulations upon which the state rules are based. They argue that the states have independent authority to adopt their own hazardous waste regulations, and the adoption of state mixture and derived-

33. *Id.* at 7630-31.

34. See *Mobil Oil Corp. v. EPA*, No. 92-1211 (D.C. Cir. filed May 11, 1992).

35. Twenty states, including Arkansas, have adopted local mixture and derived-from rules which simply cite and incorporate by reference the federal mixture and derived-from rules. Twenty-three states have adopted local mixture and derived-from rules which copy verbatim the language of the federal mixture and derived-from rules. All of the remaining states except Hawaii have adopted local mixture and derived-from rules which are similar in effect to the federal rules. See [State Solid Waste Land Use] Env't Rep. (BNA) (providing hazardous waste management rules of the fifty states).

from rules constitutes a valid exercise of state rulemaking authority. EPA and the states point out that the procedural flaw in the federal regulations, inadequate notice and opportunity to comment, is not a problem with the state mixture and derived-from rules because the states gave the public notice and opportunity to comment upon the exact terms of the federal rules that they proposed to incorporate into state law.

The reliance of EPA and the states on the validity of the state mixture and derived-from rules is subject to serious question. It is true, of course, that the states have authority to adopt their own hazardous waste regulations independent of any rules adopted by EPA. In most instances, however, the states did nothing more than copy verbatim or incorporate by reference an admittedly invalid federal regulation. Furthermore, the states' principal motivation for incorporating the federal regulations into state law was to make state law essentially identical to the underlying federal law. In light of this motivation, it seems unlikely that any state would have given serious attention to a public comment which questioned the wisdom of the mixture and derived-from rules as a matter of independent state policy.

To date, three cases have addressed the retroactivity of *Shell Oil*. First, in *United States v. Goodner Bros. Aircraft*, the Eighth Circuit reversed a group of RCRA criminal convictions because the jury had been given an instruction based on the mixture and derived-from rules that were subsequently invalidated in *Shell Oil*.³⁶ In doing so, the court squarely rejected the government's argument that *Shell Oil* should not be given retroactive effect. Second, in *Equidae Partners v. Oklahoma State Department of Health*, an Oklahoma state trial court declared the Oklahoma mixture and derived-from rules invalid because they merely incorporated, by reference the federal mixture and derived-from rules invalidated in *Shell Oil*. The trial court's decision is currently pending appeal before the Oklahoma Supreme Court.³⁷ Third, in *In Re Hardin County, Ohio*, an administrative law judge dismissed an EPA administrative enforcement proceeding against an Ohio landfill on grounds that the alleged

36. *United States v. Goodner Bros. Aviation*, 966 F.2d 380 (8th Cir. 1992). EPA argued in *Goodner Brothers* that the RCRA convictions could be upheld on the basis of the state mixture and derived-from rules, but the Eighth Circuit rejected this argument on the ground that the prosecution of the defendants had been based solely on charges of violating federal, not state, law.

37. *Equidae Partners v. Oklahoma State Dep't of Health*, Case No. C-91-532 (Dist. Ct. Washington County, Okla., Jan. 21, 1992), *appeal pending*, No. 79124 (Okla.).

RCRA violations were based on the federal mixture and derived-from rules invalidated in *Shell Oil*. The EPA Environmental Appeals Board subsequently remanded the case for further proceedings to determine whether the agency's charges could be based upon the state of Ohio's mixture and derived-from rules.³⁸

V. HWIR I — THE CBEC AND ECHO PROPOSALS

Shortly after it readopted the mixture and derived-from rules on an interim basis, EPA published a proposed Hazardous Waste Identification Rule. This proposal, known as "HWIR," sought public comment on two alternative approaches for revising the existing RCRA scheme.³⁹ The first approach would have established concentration based exemption criteria (CBEC) that would allow waste with concentrations of hazardous constituents below a certain level to exit the hazardous waste regulatory system. Under the CBEC proposal, EPA would not have changed the existing system of identifying hazardous waste.

Under this [CBEC] approach, the current waste identification system of listings, characteristics, and the mixture and derived-from rules would continue to define "entry" to the subtitle C program; this approach would define new "exit" criteria for wastes and media to leave subtitle C control and to be managed under subtitle D of RCRA and state and local waste management requirements.⁴⁰

Under the CBEC approach, EPA proposed several options for comment. One option would have set a single exemption multiple above risk-based levels. A second option would have varied the multiple depending on the hazardous constituent involved. A third option would have set technology-based exemption levels.

The second alternative proposed by EPA would have replaced the existing scheme for identifying hazardous waste with a new set

38. In *Re Hardin County, Ohio*, No. RCRA-V-W-89-R-29, 1992 WL 175711 (EPA Region V July 10, 1992) *remanded*, No. RCRA-V-89-R-29, 1992 WL 340777 (EPA Env'tl. App. Bd. Nov. 6, 1992). When EPA initiated this proceeding, the State of Ohio did not have an authorized RCRA program. The agency based its allegations on the federal mixture and derived-from rules. On appeal, however, the validity and applicability of Ohio mixture and derived-from rules arose because Ohio did have an authorized RCRA program for a portion of the time during which the violations allegedly occurred. As a result, the Ohio hazardous waste regulations were arguably enforceable by EPA under RCRA § 3008, 42 U.S.C. § 6928 (1988).

39. 57 Fed. Reg. 21,450 (1992) (to be codified at 40 C.F.R. pt. 261) (proposed May 20, 1992).

40. *Id.* at 21,452.

of "characteristic" levels for listed hazardous wastes, waste mixtures, derivatives, and contaminated media. Under this approach, the expanded characteristics option (ECHO), wastes would have entered and exited subtitle C regulation based on the new expanded characteristics levels.

In conjunction with the CBEC and ECHO proposals, EPA also proposed that some materials might be exempted from full subtitle C regulation if specified management standards were met:

[T]he Agency is also considering the use of management standards in conjunction with the [CBEC and ECHO] alternatives as a way of providing a continuum of management. Under this approach, wastes within certain concentration ranges would be contingently exempt from subtitle C regulation if certain waste management practices are followed. For example, if these wastes are disposed in a lined landfill or in areas of low precipitation, then they could be exempted from subtitle C regulation. Section III [of this proposal] discusses in greater detail the way in which management standards could be combined with each of the structural approaches to provide a more effective continuum of management for these wastes.⁴¹

EPA's HWIR proposal received a large number of comments. Industry comments concurred with the agency's frank admission that a large volume of materials defined as hazardous waste under the existing RCRA system did not merit regulation as hazardous waste. Industry commenters also tended to support the CBEC proposal which would allow materials defined as hazardous waste to exit from hazardous waste regulation based on specified concentrations of constituents.

Environmental groups, the hazardous waste treatment industry, and most state regulators vigorously opposed the CBEC and ECHO proposals. These commenters urged EPA to rescind the sunset provision which effectively required adoption of a final HWIR rule by April 28, 1993, in time to replace the interim mixture and derived-from rules. These commenters generally acknowledged that the mixture and derived-from rules had the effect of overregulating certain mixtures, treatment residues, and contaminated media,⁴² but their comments vigorously opposed the CBEC and ECHO proposals.

41. *Id.*

42. For example, the comments of the Association of State and Territorial Solid Waste Management Officials stated that "as implementers, we know the current mixture and derived-from rules are seriously flawed, as is the delisting process. We recognize and support the need for significant procedural changes to these

The strong opposition to the HWIR proposal from state regulators was particularly troublesome for EPA. Most state hazardous waste programs defined hazardous waste in a manner substantially identical to the original 1980 RCRA regulations. If EPA revised its definition of hazardous waste but the states did not follow suit, the regulated community could be faced with a patchwork quilt of stringent state regulations despite EPA's attempt to ease the burden of subtitle C compliance.

The opposition to EPA's HWIR proposal also spread to Congress. In September, Congress passed an amendment to EPA's appropriations bill which prohibited EPA from revising the interim mixture and derived-from rules prior to October 1, 1993, but required the agency to promulgate a revision of the rules not later than October 1, 1994.⁴³

In the face of overwhelmingly hostile comments and congressional opposition, and with a presidential election only a month away, EPA withdrew the HWIR proposal and rescinded the sunset provision which limited the duration of the interim mixture and derived-from rules.⁴⁴ EPA stated that it would continue to review the public comments and that it hoped to promulgate a revision of the mixture and derived-from rules "in 12 to 24 months."⁴⁵

VI. AFTER HWIR — A SEARCH FOR CONSENSUS

Although most participants in the HWIR rulemaking opposed EPA's CBEC and ECHO proposals, the positions taken by the

rules, if they are to work." #F-92-HWEP-00232, p. 2, July 23, 1992 (responding to 59 Fed. Reg. 21,450 (1992) (to be codified at 40 C.F.R. pt. 261) (proposed May 20, 1992) Comment Docket F-92-HWEP-FFFFF).

Similarly, the Hazardous Waste Treatment Council's comments stated that:

The council believes that the procedures through which hazardous waste enter and exit RCRA Subtitle C should be improved. By operation of the mixture and derived-from rules, some wastes, mixtures and residues posing negligible risks are drawn into Subtitle C, and the delisting process should proceed more quickly to provide relief in those situations. In addition, contaminated media from remedial situations poses unique challenges that must be addressed.

#F-92-HWEP-00377, p. 4, July 24, 1992 (responding to 59 Fed. Reg. 21,450 (1992) (to be codified at 40 C.F.R. pt. 261) (proposed May 20, 1992) Comment Docket F-92-HWEP-FFFFF).

43. Department of Veterans Affairs, and Housing and Urban Development, and Independent Agencies Appropriations Act of 1993, Pub. L. No. 102-389, 106 Stat. 1571 (1992). The amendment also affirmatively required EPA to promulgate a revision to the mixture and derived-from rules not later than October 1, 1994.

44. EPA announced on September 28, 1992, that it would withdraw the HWIR proposal. See BNA Entl. L. Rptr. 1491 (Oct. 2, 1992). EPA formalized the withdrawal and rescinded the sunset provision of the interim rule by a Federal Register notice published October 30, 1992. 57 Fed. Reg. 49,278 (1992) (to be codified at 40 C.F.R. § 261.3).

45. 57 Fed. Reg. 49,278 (1992) (to be codified at 40 C.F.R. § 261.3).

principal participants suggested that consensus might be achieved on at least some significant points. Participants on all sides acknowledged that the mixture and derived-from rules needed revision. In particular, participants representing a broad spectrum of interests acknowledged that the mixture and derived-from rules adversely affected the corrective action process and subjected lightly-contaminated environmental media to unnecessarily costly and burdensome regulation.

In an effort to forge a consensus, EPA invited a representative panel of participants to participate in informal roundtable discussions on revision of the hazardous waste rules. The first meeting of this roundtable group addressed procedures and began the development of options for discussion. The second meeting identified the issues related to the treatment and disposal of contaminated environmental media as a problem upon which consensus might be achievable. Subsequent meetings have refined proposals for both contaminated media and as-generated wastes. EPA's stated goal is to propose new regulations for public comment by early fall 1993. As matters now stand, it is unlikely that any new federal regulations would take the place of the interim rules adopted by EPA in the wake of *Shell Oil* until the October 1, 1994, completion deadline at the earliest.⁴⁶

VII. THE STATUS OF STATE MIXTURE AND DERIVED-FROM RULES

Chief Counsel Weaver argues eloquently in his counterpoint article for the validity of the Arkansas mixture and derived-from rules. The gist of Mr. Weaver's argument is that: (i) Arkansas law allows state agencies to incorporate other laws by reference into their regulations; (ii) ADPC&E properly exercised this authority when it incorporated the federal mixture and derived-from rules into the state Hazardous Waste Code; and (iii) the invalidation of the federal mixture and derived-from rules in *Shell Oil v. EPA* had no effect on the state rules because Arkansas law holds that when one statute incorporates another statute by specific reference, the incorporating statute is not altered or affected by any subsequent amendment or repeal of the incorporated statute.

46. On January 14, 1993, EPA promulgated regulations designed to ameliorate some of the more severe problems that the mixture and derived-from rules can cause in implementing correction action cleanups at RCRA facilities. 58 Fed. Reg. 8658 (to be codified at 40 C.F.R. pts. 260, 264, 265, 268, 270 and 271). The regulations have been challenged, see *Environmental Defense Fund v. EPA*, No. 93-1316 (D.C. Cir. filed May 14, 1993), and the resulting uncertainty has deterred most parties from utilizing the special procedures authorized by the regulations.

The Chief Counsel's defense of ADPC&E's rules is understandable, but his argument is subject to serious doubt for at least four reasons. First, the only decision that has addressed the issue, *Equidae Partners v. Oklahoma State Department of Health*, reached the opposite result and held the Oklahoma mixture and derived-from rules invalid on facts substantially identical to the circumstances present in Arkansas.

Second, Mr. Weaver's incorporation argument does not squarely address the validity of a rule created through incorporation by reference when the incorporated rule was invalid from the outset. Stated simply, can an Arkansas agency create a valid and enforceable state rule by incorporating an admittedly invalid federal rule into state law by specific reference?

Third, even if one accepts Chief Counsel Weaver's incorporation argument, there is still a problem in identifying which version of the federal rules Arkansas law now incorporates. There are at least three possibilities: the original 1980 EPA rules, which were invalidated in *Shell Oil*; the interim EPA rules promulgated after *Shell Oil*, which included an April 28, 1993 sunset clause; or EPA's current interim rules, which have no sunset clause but are subject to a congressional mandate for revision not later than October 1, 1994. As Chief Counsel Weaver notes, section 3(c) of the Arkansas Hazardous Waste Code provides that ADPC&E shall conduct rulemaking proceedings annually after the promulgation of any new or revised federal hazardous waste regulation.⁴⁷ ADPC&E's most recent revision of the state Hazardous Waste Code was commenced by a notice of proposed rulemaking and request for public comment published on April 16, 1992. The notice did not state explicitly which version of the federal mixture and derived-from rules it might be incorporating. The period for public comment closed on June 3, 1992, and the Commission formally approved the proposed revision without change by a minute order adopted June 30, 1992. If this latest revision of the state rules had any effect on the mixture and derived-from rules, it presumably adopted the federal version in effect as of the date

47. The full text of section 3(c) reads as follows:

The Director, annually, after the date of promulgation of any new or revised federal hazardous waste regulations shall conduct rule making procedures with reference to this Chapter necessary to maintain a State Hazardous Waste Management Program equivalent to the federal program. Such new or revised federal regulations upon the date of their publication as final rules of the [EPA] shall constitute minimum guidelines to the Director in formulating rule making proposals to this Chapter, shall not be construed to limit or interfere with the adoption of provisions more stringent than federal regulations.

the notice of proposed rulemaking was published—April 16, 1992. This version of the federal rules had a sunset clause which provided that the rules would expire automatically on April 28, 1993. Although EPA withdrew the sunset clause from the federal rule on October 28, 1992, there has been no revision of the state rules since June 30, 1992 that would bring that modification of the federal rule forward into state law.⁴⁸ As a consequence, if one applies Chief Counsel Weaver's argument literally, it would appear that the Arkansas mixture and derived-from rules expired on April 18, 1993 by virtue of the sunset clause incorporated in the last revision of the state rules.

Finally, and perhaps most importantly, Chief Counsel Weaver's incorporation argument does not address the substantive argument against the mixture and derived-from rules which *Shell Oil* never reached. The Arkansas Hazardous Waste Management Act defines the term hazardous waste as follows:

"Hazardous Waste" means any waste or combination of wastes of a solid, liquid, contained gaseous, or semisolid form which, because of its quantity, concentration, or physical, chemical, or infectious characteristics, may in the judgment of the department:

- (A) Cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness; or
- (B) Pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise improperly managed. Such wastes include, but are not limited to, those which are radioactive, toxic, corrosive, flammable, irritants, or strong sensitizers or those which generate pressure through decomposition, heat, or other means.⁴⁹

This state statutory definition is substantially identical to the federal statutory definition in RCRA, and both definitions seem to require that a waste must present some actual threat of hazard to human health or the environment before the waste meets the definition of hazardous waste. EPA and ADPC&E have repeatedly admitted that many mixtures and residues which are subjected to regulation by the mixture and derived-from rules are not actually hazardous to

48. On February 12, 1993, the department proposed another revision to the Hazardous Waste Code. As of this writing, there has been no final action on the February 12, 1993 proposal.

49. ARK. CODE ANN. § 8-7-203(6) (Michie 1991).

human health or the environment. In the face of such admissions, it is not clear what authority EPA or ADPC&E has to declare wastes hazardous when they admittedly pose no hazard.

The state statutory definition also contains language which may limit the department's authority to define hazardous waste by a simple incorporation of the federal rules. The state statute defines hazardous waste to be those wastes which may "*in the judgment of the department*" present a hazard to human health or the environment. The language calling for an independent judgment by the department would seem to conflict with simple incorporation of some other agency's judgment. At a minimum, if the department has exercised its independent judgment in concluding that the federal rules are appropriate, it would seem logical that an adequate administrative record should be made to demonstrate the factual basis for the department's independent determination. Historically, ADPC&E's annual revision rulemaking proceedings have not included any such record.

VIII. CONCLUSION

It seems clear that there are several serious questions regarding the validity of the current Arkansas mixture and derived-from rules. Some of these questions admittedly seem technical in nature or may be mooted by pending state rule-making proceedings, but until EPA and the states resolve the basic problem with the mixture and derived-from rules—namely that they impose stringent hazardous waste regulatory requirements on large volumes of admittedly non-hazardous materials—it is likely that legal and political challenges to the rules will continue for some time to come. EPA, state agencies, and all interested parties would be better served by developing an appropriate replacement for the mixture and derived-from rules that addresses their limitations rather than continuing the longstanding debate over the agencies' authority to adopt rules which admittedly have serious unintended adverse regulatory results.